Nos. 96-1738, 96-1759

Supreme Court, U.S.
FILED
JUL 28 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

RAYMOND RYBAR, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

and

WILLIAM J. KIRK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Third And Fifth Circuits

CONSOLIDATED BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Rybar v. United States:

Section 922(o) of Title 18, United States Code, criminalizes the mere possession of a machinegun, irrespective of any connection to commerce, interstate or otherwise. The question presented is whether, in light of *United States v. Lopez*, 514 U.S. 549 (1995), Congress has such authority under its Commerce Clause power.

Kirk v. United States:

William Joseph Kirk challenged his conviction for possession of a machinegun under 18 U.S.C. § 922(o), contending that by criminalizing mere possession of a machinegun, Congress had exceeded its authority under the Commerce Clause.

The lower court held that the scope of the Commerce Clause was not exceeded. The question presented here is:

Did Congress exceed its authority granted by the Commerce Clause by enacting 18 U.S.C. § 922(o) which prohibits mere possession of a machinegun

Reformulated Question

Whether the Commerce Clause of the United States Constitution, as recently interpreted by this Court in *United States v. Lopez*, 514 U.S. 549 (1995), allows Congress to criminalize the mere intrastate possession of a machinegun.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization whose members represent persons accused of crime. Among the missions of NACDL is to ensure justice and due process for such people. NACDL has over nine thousand members nationwide, and is affiliated with sixty-eight state and local criminal defense organizations with over twenty-eight thousand members. NACDL is the only national bar association devoted exclusively to the concerns of those charged with crimes and the attorneys who represent them.

The questions presented in the two above-styled petitions currently pending before this Court raise essentially the same issue: Whether the Commerce Clause power of Congress, as recently interpreted by this Court in *United States v. Lopez*, 514 U.S. 549 (1995), allows the United States to criminalize the mere intrastate possession of a machinegun. The answer to this question will have far-reaching impact upon the administration of criminal justice in each of the fifty states and throughout the federal judicial system. For that reason, NACDL seeks to address the interests of defendants who may not be situated precisely as the petitioners in these cases, but who will be affected by the Court's resolution of this issue. NACDL believes that it is in a unique position to assist the Court

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[1] In accordance with Supreme Court Rule 37.6, undersigned counsel certifies that no counsel for any party authored, in whole or in part, any aspect of this brief. Further, no person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

in examining the important policy questions raised by this case.[2]

CITATION TO OPINIONS BELOW

The two cases which are currently pending before this Court, and which *Amicus* addresses in a consolidated fashion in this brief, each have lower court opinions which uphold the constitutionality of 18 U.S.C. § 922(o). *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996); *United States v. Kirk*, 105 F.3d 997 (5th Cir. 1997) (*en banc*). Because the Court of Appeals for the Fifth Circuit evenly split, eight votes to eight, the decision of the original panel was affirmed by operation of law. *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995).

CONSTITUTIONAL PROVISION

This petition involves the application of Art. 1, § 8, cl.3, the Commerce Clause, of the United States Constitution, which states in relevant part:

> The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

[2] *Amicus* has obtained consent to the filing of this consolidated brief in support of the grant of a writ of certiorari from all interested parties. These letters of consent have been filed with the Clerk of this Court.

STATUTORY PROVISION

18 U.S.C. § 922(o) provides:

> (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
>
> (2) This subsection shall not apply with respect to –
>
> (A) a transfer to or by, or possession under the authority of, the United States or any department or agency thereof or a State or a department, agency, or political subdivision thereof; or
>
> (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.[3]

STATEMENT OF THE CASE

Facts and Proceedings in *Rybar v. United States*

Raymond Rybar, Jr., is a United States citizen and a resident of Pennsylvania who was a licensed federal firearms dealer who was authorized to manufacture, sell and transfer machineguns. *United States v. Rybar*, 103 F.3d 273, 275 (3rd Cir. 1996).

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[3] Although this act criminalizes the possession or transfer of such weapons, only the constitutionality of the possession proscription is challenged before this Court.

On April 4, 1992, Mr. Rybar possessed two machineguns as described in the indictment in the District Court. *Id.* These machineguns were not registered with the United States under the National Firearms Act of 1934, 26 U.S.C. § 5801, *et seq. Id.* After Congress enacted 18 U.S.C. § 922(o), it rendered the previous statute, 26 U.S.C. § 5861(e), inapplicable as it pertained to machineguns. *Id.* Therefore, the district court dismissed counts two and four of the indictment which related to "knowingly and unlawfully transferring machineguns" *Id.*

Mr. Rybar was subsequently convicted of two counts of possession of a machinegun in violation of § 922(o). *Id.* at 274. These convictions were the result of a plea agreement between Mr. Rybar and the United States which allowed him to enter a conditional guilty plea preserving his right to appeal the issue of the constitutionality of § 922(o). *Id.* at 275. The United States District Court for the Western District of Pennsylvania entered a judgment of conviction on March 31, 1995. *Id.* at 273. The United States Court of Appeals for the Third Circuit affirmed this conviction in the published opinion *United States v. Rybar*, 103 F.3d 273 (3rd Cir. 1996).

Facts and Proceedings in *Kirk v. United States*

William Joseph Kirk, a resident of Texas, became involved with one Donald James Mueller, an undercover government informant. *United States v. Kirk*, 70 F.3d 791, 792 (5th Cir. 1995). Mueller, over the course of several months, convinced Kirk to sell him two fully automatic weapons, an M-16 and an UZI machinegun. *Id.* at 792. After the delivery of the two guns, which had been home-

modified by Kirk from semi-automatic to fully automatic, Kirk was indicted in the United States District Court for the Western District of Texas for two counts of possession of a machinegun and two counts of transfer of a machinegun in violation of Title 18 U.S.C. § 922(o). *Id.* at 792-93. Mr. Kirk entered into a written plea agreement with the Government in which he pleaded guilty to one count of unlawful possession of an unregistered firearm in violation of 18 U.S.C. § 922(o). *Id.* at 792-93. In this agreement, Mr. Kirk specifically reserved his right to appeal the ruling regarding the constitutionality of the statute pursuant to Fed. R. Crim. Proc., Rule 11 (a)(2) *Id.* at 793.

In a published opinion, *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995), a panel of the Court of Appeals for the Fifth Circuit affirmed Kirk's conviction holding that the regulation of machineguns was proper under the Commerce Clause. *Id.* Rehearing was granted and after full briefing and argument, the Court of Appeals for the Fifth Circuit, sitting *en banc* issued a published opinion. *United States v. Kirk*, 105 F.3d 997 (5th Cir 1997). The Fifth Circuit, with sixteen judges presiding, equally divided on this issue of the constitutionality of the statute. *Id.* at 998. Therefore, the decision of the panel was affirmed and Mr. Kirk's conviction stood. *Id.*

REASON FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

18 U.S.C. § 922(o) purports to criminalize the mere intrastate possession of a machinegun without reference to that weapon's relationship to interstate commerce. Two

cases currently pending decision on separate petitions for writ of certiorari raise the same issue, namely whether § 922(o) exceeds the acceptable Congressional authority to regulate conduct under Art. 1, § 8, cl.3 of the United States Constitution. *Rybar v. United States*, ___ U.S. ___, No. 96-1738; and *Kirk v. United States*, ___ U.S. ___, No. 96-1759. *Amicus Curiae* supports the granting of the writ in either or both of these cases in order for this Court to address and further develop the jurisprudence of federalism, in particular as it impacts the sovereignty of state and federal powers in the area of criminal law.

In all situations in which there is an application of federal law enforcement power within a State, two separate constitutional principles must be balanced. The first constitutional principle is that criminal law-making and law-enforcement is primarily a matter for the States. However, this first principle must be weighed against a second principle, namely, that Congress has been expressly afforded the power to regulate acts that sufficiently impact a federal interest through Art. I, § 8, cl.3 – the Commerce Clause of the United States Constitution. That is, the bias in favor of State regulation of criminal offenses may be overcome should there be a sufficiently federal, or interstate, interest in the regulation of the conduct in question.

This Court in *United States v. Lopez*, 514 U.S. 549 (1995), clearly delineated those three areas in which Congress may regulate conduct, even with criminal penalties, under the commerce clause. The three areas of appropriate Congressional action are limited to the regulation of 1) the use of the channels of interstate commerce, 2) the instrumentalities of interstate commerce or people and

things in interstate commerce, and 3) activities that substantially affect interstate commerce. *See, Lopez,* at 1629. It is only through adherence to these limits on Congressional power that the delicate balance between State and Federal Government interests in law enforcement may be maintained.

In *Rybar* and *Kirk,* the two cases currently before the Court, this balance has been insufficiently and incorrectly analyzed by the courts below. Because the lower courts ultimately allow the federal sovereign to criminalize a wholly intrastate act, without proof or congressional findings of interstate impact, the traditional role of the States as primary sources of criminal law proscription and enforcement has been upset in favor of a plenary police power of Congress. This Court should act now to prevent the usurpation of the traditional State function of criminal law enforcement by the federal government.

I.

THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE ALLOWS CONGRESS TO CRIMINALIZE THE MERE INTRASTATE POSSESSION OF A MACHINE GUN.

The fundamental dual-sovereign balance:

It is well established that the punishment of crimes is primarily the province of the States. *See, Brecht v. Abrahmson,* 507 U.S. 619, 635 (1993) ("States possess primary authority for defining and enforcing criminal law.") In our system of dual or concurrent sovereignty, the States' primacy of interest in criminal justice helps insure

that citizens feel close allegiance to their State of residence. Such allegiance is created by just implementation of the laws, both public and private, to the disputes of each State's citizens. Such allegiance assures States remain viable and credible sovereigns in our system of dual powers.

> There is one transcendent advantage belonging to the province of the State governments, . . . I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment.

The Federalist Papers, No. XVII. For the federal sovereign to appropriate this power in a haphazard fashion would upset this "most attractive source of popular obedience."

Certainly, the federal sovereign enjoys wide latitude in the regulation of matters which primarily impact federal or interstate concerns. This authority is explicit in the Constitutional grant of authority to Congress through the Commerce Clause. Indeed, such regulation is a critical part of the *raison d'etre* of the federal sovereign. However, actions which are principally *intrastate in effect* may not and should not be regulated by the federal government, particularly through the intrusive power of criminal law enforcement. Where the Constitution mandates an appropriate balance between state and federal jurisdictional powers, expansive Congressional legislation may threaten such balance.

***United States v. Lopez*:**

This careful constitutional balancing act was recently explored by this Court in *United States v. Lopez*, 514 U.S.

549 (1995). In *Lopez*, this Court recognized that the power of Congress to criminalize conduct was broad, but not unlimited:

> [We] have identified three broad categories of activity that Congress may regulate under its commerce power. . . . First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

Id. at 558-59 (citations omitted). Therefore, what this Court accomplished in *Lopez* was not the rewriting – but the righting – of the constitutional balance between sovereigns in criminal law jurisdiction to proscribe.

18 U.S.C. § 922(o):

The statutory provision challenged in this case, is that portion of 18 U.S.C. § 922(o) that prohibits generally the purely intrastate possession of a machinegun.[4] This

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[4] Under § 922(o), a machinegun is defined as

> Any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed or intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any

statute is the closest relative of the statute struck down by this Court in *United States v. Lopez*, 514 U.S. 549 (1995). *See, United States v. Rybar*, 103 F.3d 273, 286 (Alto, Cir. J., dissenting). In *Lopez*, this Court struck down 18 U.S.C. § 922(q) because it criminalized, without reference to interstate impact, the possession of all types of firearms in a particular locality – namely near a school yard. Likewise, § 922(o), the statute at issue in this case, criminalizes, without reference to interstate impact, the possession of a certain type of weapon anywhere. Justice Breyer, dissenting in *Lopez* recognized as much when he queried:

> Congress has enacted . . . other statutes that contain no jurisdictional language at all, see, *e.g.*, 18 U.S.C. § 922(o)(1) (possession of machineguns). Do these, or similar statutes regulate noncommercial activities? If so, would that alter the meaning of "affecting commerce" in a jurisdictional element?

Lopez, at 630 (Breyer, J. dissenting).[5]

There is no dispute that the statute challenged would satisfy the demands of the Commerce Clause if Congress had added a jurisdictional element which prosecutors

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> combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b) (1988).

[5] Amicus believes that Rybar's petition for writ of certiorari correctly answers this query: "Yes, § 922(o) plainly purports to regulate a noncommercial activity . . . and, No, that does not alter the plain meaning of "affecting commerce," a jurisdictional element that is plainly absent in the mere intrastate possession of a firearm." *Rybar*, Pet. at 9.

would have to prove before a conviction could be garnered. That element, however, was not made part of the proof necessary for conviction. Likewise, § 922(o) might be sustainable in its current form if Congress had made specific findings that the purely intrastate possession of machineguns has a substantial effect on commerce or if Congress had assembled empirical evidence documenting such a link.[6] Neither of these two facial requisites of constitutionality exist in relation to § 922(o), therefore, the courts must determine whether any of the three '*Lopez* limitations,' previously outlined, necessarily apply to the subject of the statute.

These three categories, described in *Lopez*, in which federal power may be appropriately applied, seem to be distinct and identifiable subsets of a singular power of Congress under the Commerce Clause. The analysis of the lower courts regarding § 922(o), however, suggests that this Court has given insufficient guidance to the federal courts and law enforcement regarding which enactments fall outside the broad scope of Commerce Clause power.

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[6] The only recorded statement by the sponsor of § 922(o), Representative Hughes, seems to be: "I do not know why anyone would object to the banning of machineguns." 132 Cong.Rec. H1750 (April 10, 1986) (statement of Rep. Hughes). *See, United States v. Kirk*, 70 F.3d 791, 800 (5th Cir. 1995) (Jones, Cir. J. dissenting). Although *Amicus* does not dispute the Representative's statement, nor does *Amicus* doubt the dangerousness of such weapons, it is not the dangerousness of the object but the connection to interstate commerce that is the source of Congressional power.

The Circuit Courts of Appeals:

Although each of the courts of appeals which has considered the constitutionality of § 922(o) has concluded that it satisfies the *Lopez* limitations, there is no consensus regarding exactly why that should be the result. It is the lack of coherent analysis regarding the federal sovereign's power to criminalize conduct which is resulting in the varied, and ultimately incorrect, decisions of these courts. Six courts of appeals have addressed the issue of the impact of this Court's decision in *Lopez* on § 922(o). *United States v. Kirk*, 105 F.3d 997 (5th Cir. 1997) (*en banc*) (evenly split court affirming by operation of law panel decision, *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995)); *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996); *United States v. Kenney*, 91 F.3d 884 (7th Cir. 1996); *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996); *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996); *United States v. Wilkes*, 58 F.3d 1518 (10th Cir. 1995).

The Fifth, Sixth, and Ninth Circuits have reasoned that § 922(o) was an appropriate exercise of Congressional power as it fit the first '*Lopez* limitation:' regulation of the use of the channels of interstate commerce. *See, Kirk*, 105 F.3d 997, 998 (5th Cir. 1997) (*en banc*) (affirming panel decision, *United States v. Kirk*, 70 F.3d 791, 796 (5th Cir. 1995)); *Beuckelaere*, 91 F.3d 781, 783 (6th Cir. 1996); *Rambo*, 74 F.3d 948, 951-52 (9th Cir. 1996).

Further, the Sixth and Tenth Circuits uphold § 922(o) as an appropriate exercise of Congressional power because it complies with the second '*Lopez* limitation:' regulation of activities that threaten the instrumentalities of interstate commerce or persons or things in interstate

commerce. *See, Beuckelaere*, 91 F.3d 781, 784 (6th Cir. 1995); *Wilkes*, 58 F.3d 1518, 1521 (10th Cir. 1995).

Finally, the Third, Sixth and Seventh Circuits have held that § 922(o) withstands constitutional challenge because it meets the third and broadest of the *'Lopez* limitations:' regulation of activities that substantially affect interstate commerce. *See, Rybar*, 103 F.3d 273, 282-283 (3rd Cir. 1996); *Kenney*, 91 F.3d 884, 889 (7th Cir. 1996); *Beuckelaere*, 91 F.3d 781, 786 (6th Cir. 1996).[7]

The wide differences in rationales underlying the lower courts' support of the constitutionality of § 922(o) underscores the need for this Court's intervention. Indeed, if *Lopez* can correctly be distinguished in such a variety of ways in the same circumstance, then *Lopez* has been rendered a legal triviality and has become a decision that has no effect in practice. That is, if the wholly intrastate possession of a machinegun, without Congressional findings or further evidence of intrastate impact, may be criminalized, then Congress has the inherent power to criminalize the possession of any commodity.[8] Put

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[7] It is perhaps most accurate to now add the Fifth Circuit in the list of those Circuits which rely on the third *Lopez* limitation. In a revealing turn of events, a post-*Kirk* panel completely abandoned the analysis of the affirming *en banc* plurality which relied on the first *Lopez* limitation in favor of jurisdiction under the third. *See, United States v. Knutson*, 113 F.3d 27, 30 (5th Cir. 1997).

[8] Circuit Judge Jones perhaps put it best when she stated: "[M]ere intrastate possession of a machinegun is not a use of the channels of interstate commerce any more than mere intrastate possession of a basketball." *United States v. Kirk*, 70 F.3d 791, 799 (5th Cir. 1996) (Jones, Cir. J. dissenting).

another way, if § 922(o) may indeed be upheld under any and/or all of these rationales, then the lower courts have adopted a theory that "would go far toward converting Congress' authority to regulate commerce into a 'plenary police power.' " *Rybar*, 103 F.3d at 291 (Alito, Cir. J., dissenting) (quoting *Lopez*, 115 S.Ct. at 566).

In light of the confusion in the lower courts regarding the correct application of the *Lopez* limitations, and in light of the significant effect on the dual sovereign balance such loose interpretations of Congressional power may occasion, it is incumbent upon this Court to grant the writ to clarify the scope – and limits – of Congressional power to proscribe conduct as criminal.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Although we enjoy a constitutional system of dual sovereignty, each sovereign power necessarily has limits and legal fences are erected to prevent the trespass of power. Just as states may not declare wars against foreign nations, the federal government may not criminalize and punish acts that have no impact outside the territory of the state. This Court's role as the builder and mender of the fences between state and federal powers is perhaps the most important and unique aspect of our constitutional structure.[9] This role is particularly

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[9] Although it is true that "[s]omething there is that doesn't love a wall," in the constitutional context of the powers of the concurrent state and federal sovereigns it is also true that "[g]ood fences make good neighbors." This Court's important role is to aid in the mending once the line is breached, for, what

critical in the area of the power of each sovereign to punish wrongdoing. There is little question that the constitution permits each sovereign to punish the same act independently. *See, Abbate v. United States*, 359 U.S. 187 (1959). However, the important requirements of the double jeopardy bar and simple fairness require that the occasion for such double punishments are rare and only those in which the federal *and* state sovereigns each have an identifiable and individual interest in or effect from the criminal act. The federal punishment of the mere intrastate possession of a machinegun, no matter the nobility of the reason, breaches this necessary divide. As demonstrated above, the breach requires this Court to set the fence back in its constitutionally appropriate line. If this intrusion of federal sovereignty is allowed to stand, then jurisdiction over many similar acts could likewise be usurped by the federal sovereign, subjecting such actors to unfair double punishments.

CONCLUSION

Amicus Curiae joins petitioners Rybar and Kirk in urging this Court to grant a writ of certiorari – in either case or in both consolidated – in order to correct the failure of the lower courts to adequately limit the power of Congress *vis a vis* the Commerce Clause of the United

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Frost wrote of the gaps in the wall between property is true of the gaps in the thin fence between sovereignty:

> "No one has seen them made or heard them made,
> But at Spring mending-time we find them there."
> – Robert Frost, *Mending Wall.*

States Constitution. Such a grant of this Court's certiorari jurisdiction, and plenary review of the issues presented by these cases, would greatly aid in the administration of criminal justice as well as insure the continued viability of our carefully balanced dual-sovereign system of powers.

Respectfully submitted,

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